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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 12

STATE OF MINNESOTA,
Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,
Appellant.

On Appeal from the Supreme Court of the State of Minnesota

Amicus Curiae Brief for the State of California in Support of Respondent, State of Minnesota

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INTEREST OF THE AMICUS CURIAE

Taxes imposed with respect to net income derived in California, whether from intrastate commerce or interstate commerce, constitute an important segment of the tax system of the state. *West Publishing Co. v. McColgan*, 27 Cal. 2d 705, 166 P.2d 861 (1946), affirmed *per curiam*, 328 U.S. 823 (1946).

ARGUMENT

I. This Court Has Upheld Nondiscriminatory Taxes on or Measured by Apportioned Net Income as Among the Fairest Taxes Imposed by States on Corporations Conducting Business in More Than One State. Serious Impairment of a State Program to Employ This Fair Method of Taxation Would Result if Corporations Which Engage Exclusively in Interstate Commerce Were Permitted to Conduct Their Activities in a State Free from Any Tax with Respect to the Income Derived from the Activities in That State.

Nondiscriminatory taxes on or measured by fairly apportioned net income have been accepted as among the fairest taxes imposed by states on businesses conducted in more than one state. *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 329 (1918); *Shaffer v. Carter*, 252 U.S. 37, 51 (1920); *Butler Bros. v. McColgan*, 315 U.S. 501, 506-507, 509 (1942). Cf. *Peck & Co. v. Lowe*, 247 U.S. 165, 175 (1918); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949).

It is well established that if a taxpayer is engaged in both intrastate and interstate commerce, a state may impose a tax on the privilege of carrying on the intrastate commerce and the tax may be measured by a fair proportion of the taxpayer's net income from both intrastate and interstate commerce. *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120 (1920). See *Spector Motor Service v. O'Connor*, 340 U.S. 602, 609-610 (1951).

A state's effort to carry out a fair program of taxation involving nondiscriminatory taxes on or measured by apportioned net income would be seriously impaired if corporations engaged exclusively in interstate commerce were permitted to conduct their activities in the state free from any tax with respect to income derived from activities in the state. Discrimination would be created in favor of such

corporations as against corporations which engaged in some intrastate commerce as well as interstate commerce, and also as against competitive business that happened to be operating in wholly intrastate commerce. A financial inducement would exist, moreover, for corporations to so arrange the structure of their operations in the taxing state as to be engaged only in interstate commerce. This could further thwart the efforts of a state to administer a program of taxation having as its objective the payment of a nondiscriminatory tax on fairly apportioned net income of all corporations deriving income from activities conducted in the taxing state.

It has long been established, as we have seen, that states can impose a tax on corporations which engage in some intrastate commerce measured by a fair proportion of the taxpayer's net income from both intrastate and interstate commerce. There would seem to be no reason inherent in the policy behind the commerce clause why corporations which engage only in interstate commerce should have their net income wholly free from taxation while corporations which engage in some intrastate commerce but whose interstate commerce is just as much interstate as that of any others are subject to tax with respect to their net income including that from interstate commerce.

So far as the commerce clause is concerned, appellant's position in effect is that regardless of how extensive a corporation's activities in interstate commerce in the taxing state may be, it simply is impossible for the state to impose a tax with respect to any portion of its net income derived from those activities.

We believe this Court has provided a contrary answer in precedents already making clear that a state may impose a tax on net income derived exclusively from interstate commerce.

II. This Court Consistently Has Adhered to the View That a Tax on Net Income Derived Exclusively from Interstate Commerce, as Distinguished from a Tax on the Privilege of Engaging in Interstate Commerce, Does Not Violate the Commerce Clause.

There is no case in which this Court has held that a general nondiscriminatory tax on net income, as distinguished from an excise or privilege tax, violates the commerce clause. On the contrary, this Court frequently has pointed out the distinction between a tax on the exercise of a constitutional right and a tax on property used in, or income received from, the exercise of that right. In the case of *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), a case involving a license tax for the privilege of engaging in certain religious activities, the Court declared (page 113):

> "* * * A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce *(McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 56-58), *although it may tax the property used in, or the income derived from, that commerce*, so long as those taxes are not discriminatory. Id. p. 47 and cases cited * * *". (Emphasis added.)

And, at page 112 of the *Murdock* opinion, the Court observed:

> "* * * We have here something quite different, for example, from a *tax on* the *income* of one who engages in religious activities or a *tax on property* used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. * * *" (Emphasis added.)

A tax for the privilege of importing has been held invalid, *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S.

218 (1933), but a tax on net income from exporting has been upheld, *Peck & Co. v. Lowe*, 247 U.S. 165 (1918).

These examples are merely illustrative of the well-defined distinctions drawn by this Court between privilege taxes and taxes on property or on income.

One of the foundation cases relied upon by this Court in *Spector Motor Service v. O'Connor*, 340 U.S. 602, 609 (1951), in holding invalid a tax on the privilege of engaging in interstate commerce, is *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1925). It is of particular significance, therefore, that in the *Alpha Portland Cement* case this Court carefully pointed out that while it was striking down a tax on the privilege of engaging in interstate commerce its action was not to be construed as applying to taxes on property or income. The Court said, in this regard (page 216):

> "* * * *The right to lay taxes on tangible property or on income is not involved;* * * *"* (Emphasis added.)

This Court consistently has upheld a tax on net income from interstate commerce as distinguished from a tax on the privilege of engaging in interstate commerce.

The Court has stated flatly that a state may impose a tax on net income derived exclusively from interstate commerce. In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, this Court said (page 46):

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business * * * *A tax may be levied on net income wholly derived from interstate commerce.* * * *"* (Emphasis added.)

The following statement was made in *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, at page 656:

> "In any case, *even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee* upon the net income of a foreign corporation having a commercial domicile there, cf. *Wheeling Steel Corp. v. Fox*, supra, or *upon net income derived from within the state, Shaffer v. Carter*, 252 U.S. 37, 57; *Wisconsin v. Minnesota Mining Co.*, 311 U.S. 452; cf. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, *is not prohibited by the commerce clause* on which alone taxpayer relies. *U. S. Glue Co. v. Oak Creek*, 247 U.S. 321; *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 119-20; cf. *Bass, Ratcliff and Gretton, Ltd. v. Tax Comm'n*, 266 U.S. 271; *Western Live Stock v. Bureau*, 303 U.S. 250, 255. * * *" (Emphasis added.)

In another case involving the Memphis Natural Gas Co., the Supreme Court of Mississippi upheld a state tax imposed on *net income* of the corporation *derived exclusively from interstate commerce. State Tax Commission v. Memphis Natural Gas Co.*, 197 Miss. 583, 19 So. 2d 477 (1944). *This Court dismissed the taxpayer's appeal for want of a substantial federal question. Memphis Natural Gas Co. v. State Tax Com.*, 323 U.S. 682 (1945).

West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P.2d 861 (1946), was decided by the Supreme Court of California on the basis that although the taxpayer was engaged exclusively in interstate commerce, a tax on net income derived from California did not violate either the commerce clause or due process clause of the Constitution. Significantly, in its *per curiam* opinion affirming the decision of the Supreme Court of California (328 U.S. 823), this Court not only cited *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, but cited to the page (page 656) of the opinion wherein this

Court had said that a nondiscriminatory tax on net income derived from within the taxing state by a taxpayer engaged wholly in interstate commerce is not prohibited by the commerce clause.

Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) does not indicate that a state may not tax net income derived exclusively from interstate commerce. That case is but another one of a long established line of cases holding that a state may not impose a tax on the privilege of engaging in interstate commerce. The Court based its opinion clearly and precisely on the ground that the tax involved in the *Spector Motor* case was invalid because it was imposed on the privilege of engaging in interstate commerce.

The Court emphasized that the legal incidence of the tax was of conclusive importance in determining whether it violated the commerce clause. In referring to the state court's characterization of the tax as a "tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state," this Court said (page 605):

> "• • • The all-important 'operating incidence' of the tax is thus made clear • • •"

The Court further stated (page 608):

> "• • • The incidence of the tax provides the answer • • •"

It was forcefully stated in the *Spector Motor* case that the validity of a tax depended upon the channel through which it was sought to be collected.

> "• • • Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so. • • •." (page 608)

Since the subject of the tax was the privilege of engaging in interstate commerce, the tax was struck down as violating the commerce clause.

The Court recognized that through other channels interstate commerce could be required to pay its fair share of state taxes. Thus, the opinion states (page 609):

> "• • • The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."

The tax now before this Court is of this nature. Unlike the tax in the *Spector Motor* case, this is not a tax on the privilege of engaging in interstate commerce. It is a tax on net income. This Court traditionally has regarded taxes on net income from interstate commerce as valid for reasons similar to those for which it has upheld property taxes on instrumentalities moving in interstate commerce. This is apparent from the consistent pattern which the Court has followed in linking taxes on income with taxes on property in discussions of permissible methods of taxation. Illustrations of this pattern may be found in the italicized parts of the quotations from the *Murdock* and *Alpha Portland Cement* cases appearing earlier in this brief.

In footnote 6 of *Spector Motor Service v. O'Connor*, 340 U.S. 602, 609 (1951), the statement in *Memphis Natural Gas Co. v. Beeler* (315 U.S. 649, 656) above referred to was said to be unnecessary to the decision in the case. The footnote presumably was inserted to negative any suggestion that support might be found in the *Memphis Natural Gas* case

(a case involving an excise tax) for the contention that a tax could be imposed on the privilege of carrying on a business that was exclusively interstate in character provided the tax was measured by net income.

The validity of a tax on net income derived exclusively from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, was not attacked in the briefs in the *Spector Motor* case, nor considered in either the majority or dissenting opinion, since the issue was not involved. The brief on behalf of *Spector Motor* stressed that the tax there involved was a privilege tax, not an income tax. Far from attacking the validity of a tax on net income, it expressly recognized the acceptability of a tax on net income from interstate commerce as distinguished from a tax on the privilege of engaging in interstate commerce. (See Appellant's brief in the *Spector Motor* case, pages 10, 11, 17-19). The *Spector Motor* opinion concerned solely the validity of a franchise tax imposed for the privilege of doing business and did not purport to determine the validity of a tax on net income.

Considerations applicable to a tax on net income from interstate commerce are, as we have seen, in many respects comparable to a property tax on instrumentalities moving in interstate commerce such as railroads, barges and airplanes. The policy is said to be that a property tax is valid if there is apportionment. *Braniff Airways, Inc. v. Nebraska State Board*, 347 U.S. 590 (1954); *Standard Oil Co. v. Peck*, 342 U.S. 382, 383 (1952); *Ott v. Mississippi Barge Line Co.*, 336 U.S. 169, 174 (1949); *Johnson Oil Co. v. Oklahoma*, 290 U.S. 158, 161-162 (1933).

The problem here simply is not the same as in the case of a privilege tax which involves a tax for the enjoyment of a right granted by the Federal Constitution. The opinion

of the Supreme Court of California in the *West Publishing Co.* case, 27 Cal. 2d 705, 166 P.2d 861 (1946), contains an excellent analysis of the opinions of this Court relating to the distinction for purposes of the commerce clause between a privilege tax and a tax on income or on property.

We respectfully submit that the upholding of the net income tax here involved would be wholly in accord with the approach this Court has consistently taken with respect to apportioned property taxes on instrumentalities used in interstate commerce and taxes on apportioned net income from interstate commerce.

III. Due Process Is Satisfied by a Nondiscriminatory Tax on Fairly Apportioned Net Income.

There is no due process objection to the taxation of income earned from business activities conducted within the taxing state even though the activities constitute exclusively interstate commerce. Apportionment is designed to ascertain the net income reasonably attributable to the activities in the taxing state. *Butler Bros. v. McColgan*, 315 U.S. 501, 506-507, 509. If a tax on net income is nondiscriminatory and fairly apportioned any argument of violation of due process is at an end. *West Publishing Co. v. McColgan*, 328 U.S. 823 (1946); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Memphis Natural Gas Co. v. State Tax Commission*, 323 U.S. 682 (1945); *Butler Bros. v. McColgan*, 315 U.S. 501, 506-507, 509 (1942). Cf. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949).

CONCLUSION

We respectfully submit that the tax here involved is valid and that the judgment of the Supreme Court of Minnesota should be affirmed.

Respectfully submitted,

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